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International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 2077/2011

Views adopted by the Committee at its 115th session (19 October-6 November 2015)

Submitted by:	A.S. (represented by counsel, TRIAL: Track Impunity Always and the Centre for Victims of Torture, Nepal)
Alleged victim:	A.S.
State party:	Nepal
Date of communication:	22 July 2011 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 8 November 2011 (not issued in document form)
Date of adoption of Views:	6 November 2015
Subject matter:	Torture
Procedural issues:	Exhaustion of domestic remedies
Substantive issues:	Prohibition of torture and cruel and inhuman treatment; right to liberty and security of person; right to humane treatment of persons deprived of their liberty; right not to be subjected to arbitrary or unlawful interferences with one's family life; right to an effective remedy
Articles of the Covenant:	Articles 7, 9 (1), (2) and (5), 10 (1) and 17, read in conjunction with article 2 (3)
Articles of the Optional Protocol:	5 (2) (b)

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Annex

Views of the Human Rights Committee under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights (115th session)

concerning

Communication No. 2077/2011*

Submitted by:	A.S. (represented by counsel, TRIAL: Track Impunity Always and the Centre for Victims of Torture, Nepal)
Alleged victim:	A.S.
State party:	Nepal
Date of communication:	22 July 2011 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 6 November 2015,

Having concluded its consideration of communication No. 2077/2011, submitted to it by A.S. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5 (4) of the Optional Protocol

1.1 The author of the communication is A.S., a Nepalese national born in 1966. He submits the communication on his own behalf. He claims that Nepal has violated his rights under articles 7, 9 (1), (2) and (5), 10 (1) and 17, read in conjunction with article 2 (3), of the Covenant. The Optional Protocol entered into force for the State party on 14 August 1991. The author is represented by counsel, TRIAL: Track Impunity Always and the Centre for Victims of Torture, Nepal.

1.2 When registering the communication on 4 August 2011, and pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party to adopt all measures necessary to protect the life, safety and personal integrity of the author, so as to avoid

* The following members of the Committee participated in the consideration of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Victor Manuel Rodriguez-Rescia, Fabián Omar Salvioli, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.

irreparable damage to him, and to inform the Committee on the measures taken by the State party in compliance with the request by 5 September 2011. No information was submitted to the Committee by the State party regarding such measures.

1.3 On 7 October 2011, upon the State party's request, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided that the admissibility of the communication should not be considered separately from the merits.

The facts as submitted by the author

2.1 Owing to the armed conflict prevailing in the country, the State party authorities declared a state of emergency in November 2001. The ordinance of 2001 on terrorist and disruptive activities allowed State agents to arrest individuals on the basis of mere suspicion of involvement in terrorist activities, and various constitutionally granted human rights and freedoms were suspended. During the conflict, practices of torture, illegal detention, extrajudicial killing, inhuman treatment of persons in detention and enforced disappearance became common and widely used by both parties to the conflict. A number of United Nations mechanisms referred to such practices as systematic and widespread.[1] Despite the end of the conflict and the signing of the Comprehensive Peace Agreement in 2006, the practices of torture and arbitrary detention remain prevalent, in part due to the inexistence or inadequacies of laws and the weak law enforcement capacity of the penal system in general.

2.2 The author worked as a porter and cook for a trekking business in Jorpati, Kathmandu District. On 18 July 2007 at around 8.30 p.m., as the author was walking home, a group of drunken police officers approached him and asked him for a bribe. When the author refused to give them money, the officers beat him and arrested him without producing an arrest warrant or informing him of the grounds for the arrest. His wallet and mobile telephone were taken by the police officers. The author was dragged by the arms and hair to the Jorpati police station, where he was again severely beaten with bamboo sticks and kicked with boots until he lost consciousness. Approximately one hour later, a police van arrived at the station. The author was carried to the van, as he was semi-conscious and could not walk, and taken to a larger police station in Kathmandu, where he was kept until around midnight. At that time, he was handcuffed and taken to the hospital to ascertain whether he was drunk. The medical report indicated that the author had been beaten with sticks all over his body and that he was in need of medical care. Despite this observation by the medical staff, the author was taken back to the same police station, where he was kept in a small and overcrowded cell with 25 other people. He was denied medical attention, food and water. He was released the following day at 6 p.m. without charges, after a large crowd asking for his release had started gathering in front of the police station where he was detained. Upon the author's release, the Deputy Superintendent of the police station offered him money to "forget the incident" and not seek redress before the courts or make the events public. Another police officer told him not to bring the case before a court or else he would be "punished".

2.3 A few hours after his release, at about 10 p.m., the author was admitted to the emergency ward of the Tribhuvan teaching hospital. In the report produced by the hospital it is stated that Mr. S. was affected by "pain and bruises on the whole body and extremities ... caused by physical assault". Two days later, on 25 July 2007, Mr. S. was examined at the Forensic Medicine Department of the Tribhuvan University Institute of Medicine, which issued a report on 27 July 2007 establishing that "contusions of worrying

[1] The Working Group on Enforced Disappearances (see E/CN.4/2005/65/Add.1), the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (see E/CN.4/2006/6/Add.5) and the Committee against Torture (see CAT/C/NPL/CO/2).

dimensions" visible all over Mr. S.'s body were severe enough to cause acute renal failure and a state of toxaemia, if not timely managed. In the report, it was also stated that the injuries had been produced by repeated impacts of blunt force objects, were consistent with the story provided by the examinee, could not be produced by an accident and could not be self-inflicted.

2.4 As a consequence of his arrest and the injuries suffered, the author lost his job, which was very demanding physically. He developed post-traumatic stress disorder and has been receiving therapy from a local organization (Centre for Victims of Torture, Nepal) since the arrest. Before his arrest, he was the sole breadwinner of his family (he has two daughters). After his arrest, his wife had to spend her time caring for the author and only recently was able to open a tea shop to earn some income for the family. The family has exhausted all their savings and went into debt to pay for the author's medical treatment, rent and food.

2.5 On 20 July 2007, the Metropolitan Police Circle took ex officio disciplinary action against one of the police officers, a subinspector, who had beaten the author. However, the decision was quashed by the Metropolitan Police Range[2] on the basis of lack of evidence.

2.6 The author notes that torture is not criminalized under Nepalese law. Redress can be sought only in the form of compensation and disciplinary action as provided in the Compensation relating to Torture Act of 1996. On 15 August 2007, the author filed a complaint with the Kathmandu District Court against the subinspector. A decision was rendered on 7 July 2008, which recognized that torture had been inflicted on the author and provided for compensation of 20,000 rupees (about $280). The author received this amount from the Home Ministry in August 2010. The Court considered, however, that "further [disciplinary] action against the sub-intendant was unnecessary".

2.7 On 24 September 2008, the author filed an appeal with the Patan Appellate Court claiming that no effective disciplinary action had been taken against the perpetrator and that the compensation was not proportionate to the seriousness of the acts and the damage suffered. On 19 June 2009, the Appellate Court upheld the decision of the District Court.

2.8 On 17 September 2009, the author filed a complaint before the Supreme Court for a re-evaluation of the case, arguing that the two decisions were not in line with international standards. The Supreme Court upheld the decision from the Appellate Court on 12 October 2009.

2.9 The author adds that, since the events took place, and especially following the legal proceedings he undertook against the police officer who beat him, he and his family have been harassed by the police on several occasions. He notes that on 9 February 2011, around 8.30 p.m., eight police officers entered the family's tea shop asking for a bribe and, when the author and his wife refused to provide it, the officers beat them in front of their daughter and put them into a police van. In the meantime, police officers entered their house and took a significant sum of money. The author and his wife were brought to a police station, where a subinspector accused them of having previously filed a case against the police. They were forced to sign a blank piece of paper and were kept in detention until 11.30 p.m. During their detention, they were continuously insulted and threatened. The author returned to the police station following his release, asking for the return of the money that had been confiscated by the police. The police refused to return the money and, instead, told him to leave his rented premises within two to three days or face further problems. The author adds that, after this incident, the police parked their van in front of the tea shop every day in order to intimidate the family. This generated distrust among the neighbours towards the

[2] Higher police structure.

family. On 11 March 2011, the author and his family were evicted from their house, presumably following pressure from the police on the owner of the house, and forced to move to a different neighbourhood.

2.10 The author also claims to have received anonymous telephone calls with death threats, including on 11 July 2011, which he reported to the police the following day. On 14 July 2011, he was summoned to the police station to discuss his report about the threatening calls. The author and his wife arrived at the station at around 10 p.m. Upon their arrival, the inspector announced: "These are the people that filed a complaint against the police". The author argued with the officers and was placed in an empty room; his wife was slapped on the face, beaten and later handcuffed and placed in a cell. The author and his wife were insulted with foul language and threatened with death. Since the author was not handcuffed, he left the police station and contacted the Centre for Victims of Torture, Nepal, which in turn contacted the Office of the United Nations High Commissioner for Human Rights in Nepal (OHCHR-Nepal). A medical doctor from the Centre visited the author's wife that same day. She was still handcuffed in the cell and had visible bruises on her wrists and face. Also that day, two human rights officers from OHCHR-Nepal arrived at the police station and held separate conversations with the inspector, the author and the author's wife. They requested that the author's wife be visited by a doctor. The inspector stated that if Ms. S. apologized to him in front of OHCHR-Nepal, she could be released, otherwise, "she would be charged for insulting a police officer". The OHCHR-Nepal officers explained that it was not their mandate to force an apology but to ensure that Ms. S. was treated humanely. The officers left the station and, shortly thereafter, the author and his wife were released without charges but warned by the inspector that "they should not have exaggerated and alerted the international community without reason". On 15 July 2011, the author and his wife underwent a medical examination at the premises of the Centre for Victims of Torture, Nepal and were diagnosed with an anxiety disorder. The author claims that the lives of the members of his family and the life of their legal representative are in great danger, because they continue to be harassed and threatened by the police. They live in constant fear, with no possibility of denouncing these acts.

2.11 The author recalls that the Committee has established that the exhaustion of local remedies can only be required insofar as such remedies appear to be effective in the given case and are de facto available to the author.[3] The author claims that he has availed himself of all the remedies offered to him within the domestic legislation to obtain compensation, even if grossly inadequate to his case. He states that under Nepalese law, a criminal investigation can start only after the registration of a first information report, which can only be submitted when it is related to one of the crimes listed in Schedule 1 of the State Cases Act of 1992. Since torture has not been criminalized in Nepal, it cannot fall within the crimes for which it is permitted to file a first information report. Neither could such a report be registered for acts that may constitute elements of torture, such as abuse of power, injuries, assault and threats, even if they are criminalized under domestic legislation. The author also states that the existence of the Compensation relating to Torture Act hinders the possibility to start an action to seek criminal prosecution. Consequently, there are no remedies available to him to begin a criminal prosecution for torture or other forms of abuse. To obtain compensation, the author has submitted his case to all three judicial instances available in Nepal under the Compensation relating to Torture Act. The Act, however, is not a legislative measure that provides for criminal proceedings; it offers only disciplinary action, a remedy inappropriate for the crime of torture. In the author's case, even that inadequate remedy is ineffective, since the sanction against the offender was not

[3] The author refers, inter alia, to communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 8.3.

enforced in the end. Furthermore, the author argues that the minimal amount of 20,000 rupees afforded by the courts as compensation cannot be deemed an effective remedy. Referring to the Committee's jurisprudence, he recalls that a judicial remedy must not be available just in theory but must also be effective, that is, have a reasonable prospect of success.[4] The author also evokes the Committee's view that national human rights institutions such as the National Human Rights Commission in Nepal are not considered a judicial remedy within the meaning of article 5 (2) (b) of the Optional Protocol.[5] The author concludes that the lack of provisions under Nepalese legislation allowing for criminal prosecution for those found responsible for acts of torture renders domestic remedies for the author unavailable. The failure to implement decisions related to administrative sanctions for the perpetrators of torture and to award satisfactory and proportionate compensation and integral reparation, including rehabilitation, to the victims renders the existing, albeit inadequate, remedies ineffective. He thus submits that the requirement of exhaustion of domestic remedies should be considered fulfilled and the communication deemed admissible.

The complaint

3.1 The author submits that the State party violated articles 7, 9 (1), (2) and (5), 10 (1) and 17, read in conjunction with article 2 (3), of the Covenant with regard to himself, owing to his arbitrary arrest, detention in inhumane conditions, torture and continuous intimidation and harassment by the police, and in the light of the State party's ongoing failure to conduct an ex officio prompt, impartial, independent and thorough investigation in order to establish the facts, prosecute and punish those responsible for these crimes and provide him with an effective remedy.

3.2 The author first cites article 7 of the Covenant, claiming that he was subjected to acts of torture and cruel, inhuman or degrading treatment while in detention on the evening of 18 July 2007. He was severely beaten, to the point of losing consciousness, denied medical treatment for his injuries despite the recommendations of a doctor to whom he had been brought to ascertain whether he was drunk, and detained in a small overcrowded and unhealthy cell for 20 hours without food, drink or the chance to go to the bathroom. Before being placed in police custody, he was completely healthy and able to perform the physically demanding job of a trekking porter. At the time of his release he had bruises and abrasions all over his body and was in a state of enormous shock and confusion. At the time of the submission of the complaint in 2011, he was going through a rehabilitation process. He has been forced to leave his job, which he is no longer able to perform, and is affected by chronic fear.

3.3 The author argues that the facts he has submitted have already been verified and accepted as supported by sufficient evidence at the domestic level by the courts of all instances. The fact that the Supreme Court accepted the evidence provided by Mr. S. and afforded him compensation for the offences suffered, even if the compensation was not sufficient, should be deemed as evidence that the State itself recognizes the facts as submitted. Moreover, the author argues that the chronological sequence of the events and the marks on the author's body leave no doubt that the injuries he suffered could not have been caused by anything but beatings by the police while he was in custody. Consequently, the author believes that the facts as submitted, and that torture was inflicted on him, should be deemed as proved.

[4] The author refers to communication No. 1469/2006, *Sharma v. Nepal*, Views adopted on 28 October 2008.

[5] The author cites communication No. 1761/2008, *Giri v. Nepal*, Views adopted on 24 March 2011, para. 6.3.

3.4 Further, the author submits that the alleged acts were intentionally inflicted and involved both physical and mental suffering,[6] that those acts were committed by public officials for whom the State bears responsibility and that the purpose of the offences is to be understood in the context of common and widespread intimidating practices towards the population carried out by the police in a general framework of impunity.[7] The author also recalls the jurisprudence of the Committee, which has considered acts of violence committed by prison guards, such as beating with batons, as amounting to violations of article 7 of the Covenant.[8] Citing a former Special Rapporteur on torture who analysed the *travaux préparatoires* of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the author argues that the decisive criteria for distinguishing torture from cruel, inhuman and degrading treatment should be understood to be the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted.[9] As for the purpose of the conduct, he contends that he the offences to which he was subjected were perpetrated in a sadistic exercise of power and with the clear intention to intimidate him. As regards the powerlessness criteria, the author submits that the repeated death threats he received from the police during his detention made him feel completely lost and without hope. Those feelings were compounded by the fact that nobody knew where he was or what was happening, as he was not allowed to call anyone. In addition, the guards were drunk and without inhibition or restraint. In Nepal, police abuses are publicly known and the sense of defencelessness and debasement of the victims is even stronger. As a consequence, the treatment to which Mr. S. was subjected corresponds to breaches of article 7 of the Covenant and must be deemed to amount to torture.

3.5 The author claims that article 9 (1), (2) and (5) of the Covenant has been violated insofar as he was arrested without a warrant or justification; the arrest was unpredictable and inappropriate and arbitrary under any point of view; and he was not notified of the reasons for his arrest or of the charges against him. The author points out that by placing him in detention with potential criminals, which added to his uncertainty and fear, the police increased his risk of being subjected to other ill-treatment and torture. In addition, he was not able to request, and has not received, reparation for his arbitrary arrest and detention. Indeed, the monetary compensation he received did not encompass his unlawful detention, but was awarded to him as compensation for his ill-treatment during detention.

3.6 According to the author, he was also the victim of a violation of his right to be treated with humanity and with respect for the inherent dignity of the human person during his detention, in breach of article 10 (1) of the Covenant. The author also refers to the fact that he was denied medical treatment for his injuries, despite the explicit request of the doctor for such treatment, had no facilities for sleeping, and was detained with about 20

[6] The physical injuries caused by the beating were documented by three doctors. The injuries were so severe that they prevented the author from performing his job, which he was forced to leave. The psychological injuries have had equally lasting consequences: five years after the arrest, Mr. S. still suffers from chronic fear and requires therapy.

[7] The author points out that the Committee against Torture has underlined the prevailing climate of impunity for acts of torture and ill-treatment (see CAT/C/NPL/CO/2). He also refers to reports of the Special Rapporteur against Torture, who pointed out that, in Nepal, impunity for acts of torture was the rule, and consequently victims of torture and their families were left without recourse to adequate justice, compensation and rehabilitation (see E/CN.4/2006/6/Add.5).

[8] See communications No. 798/1998, *Howell v. Jamaica*, Views adopted on 21 October 2003, para. 6.2; and No. 868/1999, *Wilson v. the Philippines*, Views adopted on 30 October 2003, para. 7.3.

[9] Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary*, Oxford Commentaries on International Law (New York, Oxford University Press, 2008), p. 75.

people, without food or water, in a state of constant fear and restlessness. Referring to the Committee's jurisprudence,[10] the author concludes that the State party has violated his rights as guaranteed by article 10.

3.7 The author alleges that the circumstances in which he was arrested without any ground in law, the circumstances in which he was detained and the treatment to which he was subjected also constitute a violation of article 17 of the Covenant. The author submits that the conduct of the police itself amounted to a separate breach of the Covenant since it disrupted his normal family life. The permanent physical and psychological consequences Mr. S. had suffered, and was still suffering at the time the communication was submitted, forced him to quit his job, with tremendous consequences for his family life. His wife had to take a job, which hampers her ability to take care of her family; previously the breadwinner, Mr. S. became a burden on the rest of his family and the family began to face economic and social problems. All members of the family have been forced to change their lifestyle owing to Mr. S.'s torture and have been subjected to threats and harassment. Ms. S. was even detained and subjected to ill-treatment by the police in an event related to the complaint filed by Mr. S. against the police.

3.8 The author emphasizes that he was prevented from exercising his right to an effective remedy in connection with the alleged violations of articles 7, 9 (1), (2) and (5), 10 (1) and 17 of the Covenant, in violation of article 2 (3) of the Covenant. The State party failed to provide an effective remedy to the author, who is still living in fear and in continuous danger. Nepal has failed to codify and criminalize torture, has failed to investigate allegations of torture and sanction those found responsible for them and, moreover, has failed to take measures to prevent similar violations in the future,[11] in violation of article 7. Also in violation of article 7, the person responsible for Mr. S.'s torture was not prosecuted, despite the fact that his identity is well known. In addition, the author argues that a small pecuniary remedy is not itself sufficient compensation for the multiple violations to which he was subjected: the arbitrary arrest and detention in violation of article 9; the torture in violation of article 7; the inhuman treatment while in detention in violation of article 10; and the lasting consequences to his family life in violation of article 17.

3.9 As a consequence of the legal action taken following Mr. S.'s arrest and torture, Mr. and Ms. S. and their daughters have been and continue to be the target of harassment and threats, and are exposed to the risk of suffering irreparable harm to their physical and psychological integrity. The author also claims to be under surveillance by the police and to have received several threats to his life and physical integrity. He therefore requests that the Committee issue interim measures (see para. 1.2) requesting the State party to investigate all alleged episodes of threats and harassments, to refrain from any direct or indirect pressure, threat, harassment or any other measure and to take measures to ensure the security of the author, his family and his legal representative.

3.10 The author asks the Committee to request the State party, in conformity with article 2: (a) to bring the perpetrators before the competent ordinary authorities for criminal prosecution, judgement and sanction for his arbitrary arrest, inhuman detention and torture, and to publicize the results of this measure; (b) to suspend from office all the police personnel who appear to be involved in his arbitrary arrest, torture and inhuman detention,

[10] The author cites, among others, *Howell v. Jamaica*, and communication No. 709/1996, *Bailey v. Jamaica*, Views adopted on 21 July 1999.

[11] The author cites communication No. 845/1999, *Kennedy v. Trinidad and Tobago*, Views adopted on 26 March 2002, and the Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant.

pending the outcome of the investigation against them; (c) to ensure that Mr. S. obtains full reparation and prompt, fair and adequate compensation; and (d) to ensure that the measures of reparation adopted in favour of Mr. S. cover material and moral damages and incorporate measures aimed at providing restitution, rehabilitation, satisfaction and guarantee of non-repetition. In particular, to repair the harm caused to the author and prevent the repetition of similar acts, the author asks the Committee to request the State party to acknowledge its international responsibility, sending a strong signal condemning similar conduct. As a form of rehabilitation and in order to reduce the author's psychological suffering, the Government should be asked by the Committee to support the process of medical and psychological rehabilitation, bearing the burden of charges, and granting the author access to free legal aid where necessary. As a guarantee of non-repetition, the author would like the Committee to request the State party to make torture an autonomous offence under its criminal law, punishable by appropriate penalties that take into account its extreme seriousness. The different forms of participation in the commission of torture should also be criminalized and made punishable with appropriate sanctions. As a guarantee of non-repetition, the Committee should recommend to the State party that it establish throughout the country an educational programme on human rights law and humanitarian law for the armed forces, police personnel and the judiciary.

State party's observations on admissibility

4.1 In a note verbale dated 4 October 2011, the State party submitted its observations relating to the 2007 events, challenging the admissibility of the communication on the grounds of non-exhaustion of domestic remedies, abuse of the right of submission and an ill-founded and ill-substantiated communication. It states that there are several other statutory mechanisms to address violations of rights, in addition to the regular court mechanism. The State party notes that the National Human Rights Commission is an independent and impartial commission established under the Human Rights Commission Act of 1997, and that it is vested with the statutory power to conduct enquiries into human rights violations, to require any person to appear before it and to gather, receive, examine and assess information and evidence. The Commission can recommend that the Government give compensation to a victim and punish perpetrators.

4.2 The State party also challenges the allegations made by the author regarding the inefficiencies of the Nepalese judicial system, arguing that the system was established on the basis of the separation of powers and is fully independent and autonomous.

4.3 Further, the State party denies the allegation that domestic law is not in line with the standards established by the Convention against Torture, citing the Constitution, which prohibits torture, and the Compensation relating to Torture Act, which provides for the prosecution of torture and compensation of victims.

4.4 The State party concludes that the author did not furnish the Committee with reliable grounds and evidence showing that the Nepalese judicial system is ineffective. It states that Mr. S. is able to move freely and enjoy his freedom without threats or harassment. The State party believes the communication to be inadmissible on the grounds that the author has received sufficient compensation and proper justice at the domestic level. It contends that the author has intentionally misrepresented the law as well as his position, thereby abusing his right to submit a communication, which is ill-founded and not sufficiently substantiated.

State party's observations on the merits

5.1 In its note verbale dated 9 May 2012, the State party submitted its observations on the merits of the communication, challenging the allegation of arbitrary arrest in respect of Mr. S. and his wife. It states that on 9 February 2011, in the course of a patrol, the police

found the distillery of the couple open at midnight, with people shouting inside. The police asked them to close the distillery, but the couple started to quarrel with the police. When the police tried to get Mr. S. under control, the couple pushed and assaulted the police, who then had to arrest Mr. S. He was placed in the police van, alone. His wife was not arrested but refused to let the police take away her husband alone and climbed into the van of her own will. At the police station, Mr. and Ms. S. were reminded of their obligation to abide by the law and not open the distillery late at night. They were freed the same night in the care of Mingma Sherpa, the owner of the premises that housed the distillery. The State party indicates that after that incident, Mr. and Ms. S. were neither harassed nor threatened. At no point was a bribe demanded from them, and no money or telephone was taken from them. The State party claims that these are false allegations, which the author must prove beyond reasonable doubt.

5.2 With respect to the alleged events in 2007, the State party disputes the claim that under Nepalese legislation torture is not a criminal offence. It indicates that torture and ill-treatment are completely prohibited by the Constitution of 2007, which provides that acts of torture shall be punishable by law. It also notes that there is special legislation dealing with torture, namely, the Compensation relating to Torture Act, and that a comprehensive bill on torture is pending in the parliament.

5.3 As regards the various judgements made by successive domestic courts, including the Supreme Court, which denied a review of the case on the ground that there was no legal error in the previous judgements, the State party argues that the case of Mr. S. has already been settled by the highest court of Nepal. The legal system of Nepal, it notes, has incorporated the values and norms of an independent and competent judiciary, which all must respect.

5.4 Regarding the demand made by the author for action against the police personnel involved in the alleged mistreatment, the State party notes that two officers were warned as per the police rules of 1992. The investigation found that they had made some minor errors while arresting Mr. S. on 9 February 2011. The officer involved in the first arrest on 18 July 2007 was reprimanded in a departmental action.

5.5 The State party further submits that it is committed to protecting the life, safety and personal integrity of its citizens, and to taking action consistent with due process against persons involved in human rights violations. It states that no harassment, intimidation, threat or torture has been reported in connection with Mr. and Ms. S., who are enjoying their constitutional and legal rights. There is no doubt, in the State party's opinion, that they have obtained justice.

5.6 The allegation that the State party has violated its obligations under articles 7, 9 (1), (2) and (5), 10 (1) and 17 of the Covenant is baseless and false, according to the State party. It notes that Mr. S. was arrested by the police as per the authority of the law, and that he has obtained justice. Departmental action has been taken against some police personnel for these incidents and the State will enact new laws on torture in the future. The State party concludes that there is no need for further investigation or enquiry and asks the Committee to reject the submission made by the author, as there are no justifiable and substantive grounds for entering into the merits of the case.

Author's comments on the State party's observations

Admissibility

6.1 In a letter dated 16 July 2012, the author commented on the State party's observations on admissibility.

6.2 The author submits that the fact that he was tortured during his arbitrary arrest and detention by the Nepalese police on 18 July 2007, as well as the long-term physical and psychological consequences, have been substantiated by medical reports. He also points out that both the Kathmandu District Court and the Kathmandu Appellate Court confirmed that the author had been subjected to torture while in police custody. The violations of articles 9 (1), (2) and (5), 10 (1) and 17 are also, according to the author, well documented.

6.3 With regard to abuse of the right of submission, the author notes that the communication was submitted well within the deadline of five years set in rule 96 (c) of the Committee's rules of procedure, that it does not contain insulting or inappropriate language and does not misuse the complaint procedure.

6.4 Turning to the argument presented by the State party that torture is prohibited under domestic legislation and provides for redress of violations of any fundamental rights, the author indicates that he does not contest that torture is prohibited in the Constitution. However, he submits that the fact that torture and ill-treatment are prohibited under domestic law does not mean that it does not occur, or that the existing legal framework fully meets international human rights standards on the matter. The author refers to reports of the Working Group on Enforced and Involuntary Disappearances (E/CN.4/2005/65/Add.1) and of the Special Rapporteur on torture (E/CN.4/2006/6/Add.5), in which the existence of a systematic practice of torture in Nepal has been pointed out. Further, a number of local and international organizations, including OHCHR, have documented the widespread and systematic nature of torture in Nepal, as well as the deficiencies in the legal system that allow for the perpetuation of the practice.[12] Despite provisions in the Constitution stating that acts of torture shall be punishable by law, acts of torture are neither autonomously criminalized nor sanctioned in Nepalese legislation. The author points out that the draft criminal code does not contain any provision making torture a separate criminal offence. In addition, the Compensation related to Torture Act is an act of civil nature; it does not envision the possibility of criminal prosecution for those found responsible for acts of torture, but rather only pecuniary compensation and disciplinary action against the perpetrators. This situation of impunity, the author argues, does not discourage the commission of acts of torture.

6.5 In the present case, the author notes that the fact that the highest Nepalese judicial organ confirmed a negligible amount of compensation determined under vague criteria,[13] which is clearly not an adequate remedy for torture, and that no serious disciplinary action has been taken against the perpetrator, demonstrates the inefficiency of both the legislation prohibiting torture and the means provided to obtain redress.

6.6 Regarding the argument presented by the State party regarding the 2007 events, namely, that the author should have used other mechanisms to seek redress, including the National Human Rights Commission, the author notes that the Commission is not a judicial body. Its powers are limited to documenting cases of human rights violations, conducting enquiries and investigations, recommending potential disciplinary action against alleged perpetrators and making their names public. It has neither the power to undertake criminal proceedings against perpetrators nor to impose punishment. The Commission can never replace access to justice and redress for victims of human rights violations. Referring to the

[12] See A/HRC/10/53; Advocacy Forum, "Torture still continues: a brief report on the practice of torture in Nepal" (2007); Advocacy Forum, *Hope and Frustration: Assessing the Impact of Nepal's Torture Compensation Act –1996* (2008); and Human Rights Watch, "Still waiting for justice: no end to impunity in Nepal" (2009).

[13] The amount granted to the author, 20,000 rupees (about $280) is only one fifth of the maximum amount provided for in the Compensation related to Torture Act.

Committee's jurisprudence,[14] the author concludes that his communication cannot be deemed inadmissible on the basis of the mere existence of a mechanism incapable of undertaking or referring complaints for prosecution and which may not order the payment of adequate compensation.

6.7. With respect to the alleged inefficiency of the judicial system, which the author claims and the State party disputes, the author first points out that the State party does not provide information to back up its claim that the judicial system is independent and efficient. The author further refers to findings of the Committee against Torture and of the International Commission of Jurists, which indicated that the independence of the judiciary in Nepal is weak and ineffective, making it almost impossible for a complaint for alleged human rights violations to be successful.[15]

6.8 Regarding the adequacy of domestic law in relation to the Convention against Torture, the author quotes the Committee against Torture, which noted that the current legislation was not in line with the definition of article 1 of the Convention and recommended that the State party adopt new legislation and amend existing laws.[16] The author further cites the Special Rapporteur on torture, who has deemed disciplinary actions "grossly inadequate" as the sole sanction against perpetrators of acts of torture (E/CN.4/2006/6/Add.5, p. 3). Such actions are, however, the only remedy available to victims of torture in Nepal, together with minor pecuniary compensation. The author submits that the State party's arguments that the Nepalese legislation is in line with international standards is untenable.

6.9 Replying to the argument made by the State party that Mr. S. is moving freely and able to enjoy his freedom without threats or harassment, the author recalls the numerous times he was threatened by the police.[17] He further argues that the fact that the Committee had requested the State party to adopt measures necessary to protect the life, safety and personal integrity of the author is evidence that the Committee deemed the situation serious and the author at risk of irreparable damage. The author points out that the State party, to his knowledge, has failed to implement the protection measures.

Merits

6.10 Replying to the State party's submission on the merits, dated 9 May 2012, the author remarks that the State party does not contest Mr. S.'s arbitrary arrest on 18 July 2007, his subsequent torture and ill-treatment, the inhuman conditions of detention and the impact they had on his family life, which are the core of the author's allegations of a violation of his rights under articles 7, 9 (1), (2) and (5), 10 (1) and 17, and 2 (3), read in conjunction with the other articles. In the author's view, the events of 9 February 2011, which are mentioned in the State party's comments, are further proof of the continuous threats and

[14] The author refers to *Sharma v. Nepal*, para. 5.6, as well as to *Giri v. Nepal*, para. 6.3, where the Committee states that national human rights institutions such as the National Human Rights Commission in Nepal are not considered a judicial remedy within the meaning of article 5 (2) (b) of the Optional Protocol.

[15] The author refers to CAT/C/NPL/CO/2, para. 16, and International Commission of Jurists, "Nepal: the rule of law abandoned" (March 2005), p. 9.

[16] The author refers to CAT/C/NPL/CO/2, para. 12.

[17] The author refers to his release on 19 July 2007, when he was told to "forget the incident" and that he would "get only suffering, not justice"; to 9 February 2011, when police officers came to the tea shop and asked for money; to continuous telephone threats in May and June 2011, including one that he reported to the police on 12 July 2011; and to the fact that the reporting of the telephone threats led to his and his wife's detention and ill-treatment on 14 July 2011.

harassment to which the S. family has been subjected since their decision to seek redress for the events of 18 and 19 July 2007.

6.11 The author challenges the facts regarding the incident of 9 February 2011 as presented by the State party and reiterates the version of the events as submitted in his initial communication. Refuting the argument that after that incident the police did not engage in any further incidents of harassment of, threats against or intimidation of him and his wife, he refers to the subsequent events of July 2011.

6.12 As to the argument submitted by the State party that it is incumbent upon all to respect the judgements of the judiciary, the author points out that since the State party has recognized the competence of the Committee to receive communications from individuals, he has the right to bring his complaint before the Committee.

6.13 The author further submits that the State party did not provide details about the kind of action that has been taken against the police inspectors involved in the ill-treatment to which he was subjected on 9 February 2011. He also rejects the manner in which the State party refers to beatings and death threats as "minor errors". He reiterates that none of the State agents responsible for his torture and ill-treatment and for his wife's ill-treatment have been subject to a thorough investigation; no criminal proceedings have been initiated, and no disciplinary action has been implemented.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the case is admissible under the Optional Protocol.

7.2 As required under article 5 (2) (a) of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 With regard to the exhaustion of domestic remedies, and in particular the potential recourse to the National Human Rights Commission, the Committee recalls that it is generally not necessary to exhaust recourse to non-judicial bodies in order to fulfil the requirements of article 5 (2) (b) of the Optional Protocol.[18] It also recalls that national human rights institutions such as the National Human Rights Commission in Nepal are not considered a judicial remedy within the meaning of article 5 (2) (b).[19] The Committee notes that the State party did not identify other available remedies, and the author claims that he has availed himself of all available domestic remedies. The Committee therefore considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

7.4 The Committee has noted the State party's argument that the communication should be considered inadmissible because the author has intentionally misinterpreted the law and misrepresented his position and has failed to substantiate his claims. The Committee also notes, however, that the claim of torture and ill-treatment made in 2007 was confirmed by three medical reports and the judgement of three courts, that the ill-treatment Mr. S. was subjected to while in detention was not challenged by the State party, that the Committee itself has found the practice and legislation of the State party to be in need of reform[20] and

[18] See *Giri v. Nepal*, para. 6.3.

[19] Ibid.

[20] In March 2014, when it considered the second periodic report of Nepal, the Committee expressed concern at the widespread use of torture and the failure of the State party to adopt legislation defining

that the author signed a power of attorney on 19 May 2011 authorizing TRIAL to represent him. The Committee thus considers that the author's claims are sufficiently substantiated for purposes of admissibility and that they should be considered on their merits.

7.5 As all admissibility requirements have been met, the Committee declares the communication admissible and proceeds to its consideration of the merits.

Consideration of the merits

8.1 The Committee has considered the present communication in the light of all the information made available to it, as provided under article 5 (1) of the Optional Protocol.

8.2 The Committee takes note of the author's unrefuted allegations that he was tortured by police officers during his detention on 18 July 2007. On the basis of the information at its disposal, including three medical reports and the decisions of three domestic courts recognizing that torture had been inflicted on the author, the Committee finds that the treatment to which the author was subjected by police officers, with the aim of intimidating him and with lasting consequences, amounts to a violation of article 7 of the Covenant.

8.3 The Committee takes note of the authors' allegations under article 9 (1), (2) and (5) that he was arrested and detained on 18 July 2007 without an arrest warrant; that he was never informed of the reason of his arrest or of the charges against him; and that he was never awarded compensation for his unlawful detention. In the absence of a response from the State party in this regard, the Committee considers that the arrest and detention of the author constitutes a violation of his rights under article 9 (1), (2) and (5) of the Covenant.

8.4 Regarding the complaint under article 10 (1), the Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity. In view of the undisputed allegations concerning the fact that the author was denied medical treatment for his injuries while in detention on 18 July 2007, that no food or water were provided to him for more than 20 hours, and that he was detained in crowded and unhealthy conditions, and in the absence of information or challenges from the State party in that regard, the Committee finds a violation of article 10 (1) of the Covenant.[21]

8.5 With regard to the alleged violation of article 17, the Committee notes the author's claims that, as a consequence of the violations committed against him and his quest for justice and redress, his family life has been arbitrarily interfered with and that his entire family has been subject to repeated threats and harassment. The Committee further notes the author's claim that in February 2011, he and his wife were beaten in their home in front of their daughter, detained and subjected to ill-treatment by the police in an event related to the complaint the author had filed against the police. The author further states that in July 2011, Ms. S. was slapped and beaten and handcuffed in a police cell, and that as a result of the police harassment, he and his wife suffer from an anxiety disorder. The State party disputes the author's version of the arrest in February 2011, but otherwise does not address the above facts other than to state that after the February 2011 incident, Mr. and Ms. S. were neither harassed nor threatened. The Committee concludes that the conduct of the

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and criminalizing torture. It recommended that the State party adopt legislation defining and prohibiting torture with sanctions and remedies commensurate with the gravity of the crime, in accordance with international standards. See CCPR/C/NPL/CO/2, para. 10.

[21] See general comment No. 21 (1992) on humane treatment of persons deprived of their liberty, para. 3; and communications No. 1779/2008, *Mezine v. Algeria*, Views adopted on 25 October 2012, para. 8.8, and No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2.

police officers constitutes unlawful interference with the author's privacy, family and home, in violation of article 17 of the Covenant.

8.6 The author invokes article 2 (3), which requires States parties to ensure that individuals have accessible, effective and enforceable remedies for asserting the rights recognized in the Covenant. The Committee reiterates the importance it attaches to States parties establishing appropriate judicial and administrative mechanisms for addressing alleged violations of rights under domestic law. It refers to paragraph 15 of its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, in which it states that a failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. When allegations are made about the commission of the most serious violations of the Covenant, such as a violation of article 7, the State party is normally expected to resort to criminal investigations and prosecutions in response. In the present case, the Committee observes that, despite the author's efforts and legal proceedings in the Kathmandu district and appellate courts and the Supreme Court to seek redress, no thorough and effective investigation has been concluded by the State party in order to establish the facts surrounding his detention, and no criminal proceedings have ever been started to bring the perpetrators to justice. Therefore, the Committee considers that the State party has failed to conduct a thorough and effective investigation into the torture and ill-treatment, unlawful arrest and detention and continuous harassment to which the author was subjected, and to bring any appropriate criminal proceedings against the perpetrators. Additionally, the 20,000 rupees received by the author as compensation for having been tortured does not constitute an adequate reparation commensurate with the seriousness of the violations inflicted. Accordingly, the Committee concludes that the facts before it also reveal a violation of article 2 (3), read in conjunction with articles 7, 9 (1), (2) and (5), 10 (1) and 17 of the Covenant.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of articles 7, 9 (1), (2) and (5), 10 (1) and 17, and of article 2 (3), read in conjunction with articles 7, 9 (1), (2) and (5), 10 (1) and 17 of the Covenant, with regard to the author.

10. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to: (a) conduct a thorough and effective investigation into the facts submitted by the author, in particular the treatment to which he was subjected on 18 July 2007; (b) prosecute, try and punish those responsible for the arbitrary arrest, torture and ill-treatment, inhuman detention and harassment of Mr. S. and make the results of such measures public; (c) provide adequate compensation and appropriate measures of satisfaction to the author for the violations suffered; and (d) ensure that any necessary and adequate psychological rehabilitation and medical treatment is provided to the author. The State party is also under an obligation to take steps to prevent the occurrence of similar violations in the future. In this connection, the Committee reiterates its recommendation that the State party should take measures to eradicate torture and ill-treatment, including by adopting legislation defining and criminalizing torture with sanctions and remedies commensurate with the gravity of the crime, in accordance with international standards (see CCPR/C/NPL/CO/2, para. 10).

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure for all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when

a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them widely in the official languages of the State party.